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Supreme Court of the United States

OCTOBER TERM, 1946

No. 490

AMERICAN LECITHIN COMPANY, INC.,
Petitioner,

v.

PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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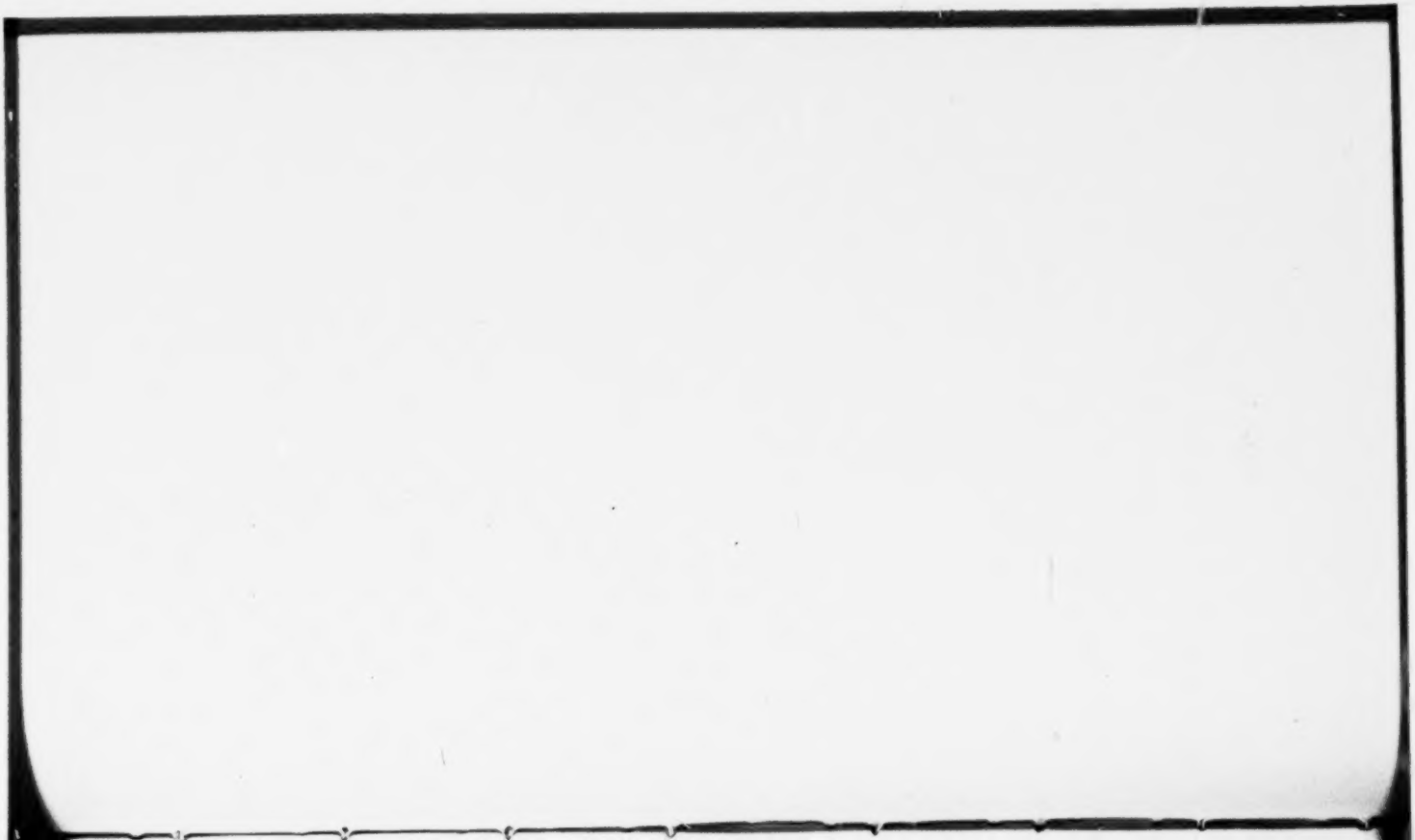

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Supreme Court of the United States

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No.

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v.

PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above-named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit may issue to review the judgment of that Court made on the 14th day of June, 1946, in the above-mentioned cause.

Statement of Proceedings in Court Below

This cause arose under the provisions of Sections 401, 403 and 701 of the Federal Food, Drug and Cosmetic Act (June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. Sections 341, 343 and 371), hereinafter referred to as the "Act".

Petitioner, on February 10th, 1945, filed with the United States Circuit Court of Appeals for the Second Circuit a petition for judicial review of an order of the Federal Security Administrator dated December 4, 1944, published December 6, 1944, promulgating regulations fixing and establishing definitions and standards of identity for cacao products (F. R. Doc. 44-18393, 9 F. R. 14329). These regulations were issued as Part 14 of Title 21, Chapter I of the U. S. Code. The petition for review was filed pursuant to Section 701(f)(1) of the Act (21 U. S. C. Sec. 371(f)(1)).

On June 14th, 1946, the United States Circuit Court of Appeals for the Second Circuit rendered its decision dismissing the petition for lack of jurisdiction, holding that the aforesaid order does not "adversely affect" the petitioner.

Statement of Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet officially reported. A copy thereof is set forth at length in the Record (Tr., pp. 207-209). The denial that petitioner is "adversely affected" is based on a construction by respondent of his own order, which construction the Court below adopted, though it is no part of the record. This construction is to the effect that, although the order prescribes the designation of lecithin as an ingredient in cacao products by the words "Emulsifier Added" or "With Added Emulsifier" (Tr., pp. 18, 20), this does not constitute a prohibition against the addition of the word "lecithin" if users so wish (See opinion below, Tr., p. 208). Upon this premise the Court held that any adverse effect of the order upon petitioner was too remote and indirect to give petitioner standing to review the order.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on June 14, 1946. The jurisdiction of this Court is invoked under Section 701(f)(4) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 371(f)(4)) and Section 240 of the Judicial Code (28 U. S. C., Sec. 347). Both Sections are set forth in the Appendix.

Summary Statement of Matter Involved

Petitioner, American Lecithin Company, Inc., is a corporation duly created and existing under the laws of the State of Ohio, duly qualified to do business in the State of New York, and with its principal place of business in the State of New York at Elmhurst, Long Island, in the City of New York, County of Queens, within the Second Circuit of the United States Circuit Court of Appeals. Respondent, Paul V. McNutt, was the Federal Security Administrator of the United States who, acting by Watson B. Miller, as acting Federal Security Administrator, issued the aforesaid order, fixing and establishing definitions and standards of identity for cacao products.

Petitioner owns patents covering processes for the extraction and refining of lecithin which is used in the manufacture of chocolate products. Petitioner licenses the use of such processes and sells lecithin for use in the manufacture of chocolate products. Respondent's aforesaid order permits the use of lecithin as an optional ingredient in such products. However, when so used, respondent's aforesaid order requires the label to bear the statement "Emulsifier Added" or "With Added Emulsifier". Petitioner seeks to have lecithin labeled as "lecithin", this being its common and usual name.

The controversy tests the power of respondent under the statute to require designation of an optional ingredi-

ent by some word other than its usual or common name. Respondent has directed the designation of the optional ingredient lecithin by a word which is intended to be descriptive of its function. Petitioner claims that even as to function the word selected, namely "emulsifier", is false and misleading. Beyond this, however, petitioner claims that respondent has exceeded his authority in selecting other than the usual and common name of the ingredient.

Copies of the findings of fact, paragraphs and provisions of said order relating to petitioner's product lecithin will be found in the Record (Tr., pp. 15-21).

Principal Questions Presented

1. Did the Circuit Court of Appeals properly refuse jurisdiction on a "construction" of the order by respondent dehors the record?

2. Did the Circuit Court of Appeals, on the construction of the order which it adopted, properly hold that petitioner is not adversely affected by the order and therefore has no standing to seek review thereof?

3. In view of the statutory requirement that optional ingredients be designated by their common and usual names, and the fact that the record shows without contradiction that lecithin is the common and usual name of petitioner's product, did the Circuit Court of Appeals properly hold that the requirement of the order that the word "emulsifier" be used to designate the presence of lecithin as an optional ingredient did not constitute an appropriate basis for review of the order upon petitioner's application?

4. Did the Circuit Court of Appeals properly hold that the adverse effect of respondent's order upon petitioner is too remote and indirect to give petitioner standing to review the order?

5. Under the Act, does a party to the proceedings before the Administrator have standing to review the Administrator's order when the effect thereof is to subject the party to increased competition and to impair the good will inherent in the usual and common name of his product by depriving him of the required use of that name by users of his product?

Statute and Orders Involved

Pertinent excerpts from the Federal Food, Drug and Cosmetic Act will be found in the Record (Tr., pp. 2-4) and in the Appendix. Pertinent excerpts from respondent's order, the judicial review of which was denied for lack of jurisdiction, are set forth in the Record (Tr., pp. 15-21). The full text of respondent's order is set forth in the Record (Tr., pp. 151-151-I).

Reasons for Granting Writ of Certiorari

The principal questions presented, as stated above, involve several important principles in the field of administrative law, justifying the granting of a writ of certiorari.

In acting upon a construction of the Administrator which it termed "reasonable", the Court below ousted itself of jurisdiction upon a construction of the order dehors the record. The so-called construction of the order actually amounted to amendment; but whatever it was, it was done without public announcement and by mere statement in the Government's brief and argument before the Court. For the Court below to oust itself of jurisdiction upon such a basis presents grave questions. May an administrative officer cut off judicial review of his orders by a process of verbal adjustment to the exigencies of litigation as it arises? Should the Courts accept "construction" or "amendment" which softens or parries the impact of the order upon the complainant who challenges its validity?

In addition, the decision below raises serious questions of divergence between Circuit Courts of Appeal as to what constitutes a party "adversely affected" and thus having standing to review an administrative order. The divergence of rule calls for an authoritative decision by this Court.

A further question of importance involves the illegality of the action of the Administrator in having ordered the designation of lecithin as an optional ingredient in chocolate products by the use of a word other than its usual and common name. This presents an important question of construction of the Food, Drug and Cosmetic Act.

These reasons for the granting of the petition will be amplified in a supporting brief.

Conclusion

For the reasons indicated above, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Dated, New York, N. Y., September 9th, 1946.

Respectfully submitted,

BAER & MARKS,
Attorneys for Petitioner,
By: DONALD MARKS.

DONALD MARKS,
MAX BENJAMIN,
Of Counsel.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK, }

DONALD MARKS, being first duly sworn, deposes and says: that he is a member of the law firm of Baer & Marks, maintaining offices at 20 Exchange Place, Manhattan Borough, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for American Lecithin Company, Inc., which was the Petitioner in the proceedings before the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter; that he makes this verification on behalf of American Lecithin Company, Inc., as Petitioner herein; that affiant has read the foregoing petition, was the attorney for said Petitioner, American Lecithin Company, Inc., and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to the favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS.

Subscribed and sworn to before me
this 10th day of September, 1946.

BESS TURNER
Notary Public, Kings County
Kings Co. Clk's No. 104, Reg. No. 195T8
N. Y. Co. Clk's No. 408, Reg. No. 324T8
Commission Expires March 30, 1948

Supreme Court of the United States

OCTOBER TERM, 1946

No.

AMERICAN LECITHIN COMPANY, INC.,
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v.

PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below, Jurisdiction, Statement of the Case

A statement of the opinion below, a statement concerning the jurisdiction of this Court and a summary statement of the matter involved appears at pages 2-4 hereof and accordingly is not here repeated.

Specification of Errors to Be Urged

It is submitted that the United States Circuit Court of Appeals for the Second Circuit erred:

1. In dismissing the petition for judicial review upon a construction of respondent's order dehors the record.

2. In holding that petitioner is not adversely affected by respondent's order and, therefore, has no standing to seek review thereof.

Authorities and Argument

POINT I

The Court below should not have dismissed the petition upon a construction of the order dehors the record.

The order specifically names lecithin as a permissible optional ingredient in various types of chocolate products (Sections 14.6 (a)(3); 14.7 (a)(3); 14.8; 14.9; 14.10; 14.11; 14.12; Tr., pp. 17, 19, 20 and 21). The order then provides that when lecithin is used "the label shall bear the statement "Emulsifier Added" or "With Added Emulsifier" (Section 14.6 (e)(2) and 14.7 (c)(2), Tr., pp. 18 and 20).

There is nothing in the record to indicate, or justify the assumption by the Court below, that the order permits the label to read "Emulsifier Lecithin Added" or "With Added Emulsifier Lecithin". Yet that is the specific premise upon which the Court below acted in refusing jurisdiction (Tr., p. 208).

The Court in this connection stated:

> "We accept this reasonable construction by the Administrator of his own order and shall decide the question of jurisdiction on this basis."

Such a complete change in the terms of the order scarcely comes within the scope of "construction". It alters the plain and mandatory words, making them no longer exclusive in import. But whether this constitutes amendment or interpretation, it is done without public announcement and dehors the record.

The danger of the Court's acceptance of this alteration of the order lies in the fact that neither the present Administrator nor any future Administrator is bound by

the construction upon which this case has been decided. The case having been so decided, the order remains beyond challenge, since time has now run against any challenge of the terms of the order. (Sec. 701(f)(1); 52 Stat. 1055; Title 21 U. S. C. Sec. 371).

Thus, an administrative officer, by his own say-so, has succeeded in ousting the Courts of jurisdiction to review his order in an important respect and has thus rendered the order inviolable against future attack. If the same Administrator, or some successor, should see fit to adopt a different view of the order, there would be no public record binding him to the present interpretation and there would be no one to challenge the new construction in any event.

This is administrative irresponsibility run riot. To say that we have a government of laws and not of men under such circumstances is to adopt too sanguine a view of the administrative process. It is one thing to give great weight to administrative findings because they are presumably the result of expert judgment. It is quite another thing to hold that an administrative officer may compel abdication by the Courts by an unrecorded construction of his order which the Courts see fit to adopt as "reasonable" and thus as a basis for a denial of jurisdiction.

The relative unimportance of the particular issue in this proceeding is lost in the gravity of the principle involved. The record here shows a specific labeling requirement laid down by respondent. On the basis of that requirement, petitioner is plainly "adversely affected" and entitled to standing to review the order. The petition for judicial review should have been entertained on that basis and the order reviewed on its merits.

POINT II

On the construction of the order adopted below, the Court erred in holding that petitioner is not adversely affected by the order and therefore has no standing to seek review thereof.

The Court below applied its own ruling in

> *U. S. Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 Fed. (2d) 116,

distinguishing that ruling from the decisions in

> *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 Fed. (2d) 258 (C. C. A. 7); and
> *Land O'Lakes Creameries Inc.* v. *McNutt*, 132 Fed. (2d) 635 (C. C. A. 8).

(Tr., p. 209.)

The question of what constitutes a party "adversely affected", having standing to review an administrative order, has become one of prime importance in the administration of the law. The decisions of the several Circuit Courts of Appeal on this subject are at variance both in their reasoning and results.

This Court has not yet had occasion to pass directly upon the question here presented. In a matter of such public importance and involving divergent views of Circuit Courts of Appeal, this Court should indicate the correct rule as a guide in the ever-increasing mass of litigation arising out of administrative orders.

A brief summary of the *Staley, Land O'Lakes* and *U. S. Cane Sugar Refiners'* cases will serve to state the problem.

In the *Staley* case, the petitioner sought to set aside an order of the Secretary of Agriculture promulgating a regulation fixing and establishing a definition and standard of identity for sweetened condensed milk, pursuant to

Section 701 (f)(1) of the Act (21 U. S. C., Sec. 371 (f)(1)). The order did not permit use of corn syrup as a saccharine ingredient in sweetened condensed milk. Petitioner appealed as to this aspect of the order, claiming its invalidity on several grounds. Respondent contended that the petition should be dismissed for lack of jurisdiction on the ground that petitioner was not engaged in the sale of sweetened condensed milk, but in the manufacture and sale of corn syrup, and therefore was not adversely affected by the order. The Circuit Court of Appeals, for the 7th Circuit, found, however, that the exclusion of petitioner's product as a saccharine ingredient gave petitioner standing to review the order.

In the *Land O'Lakes Creameries* case, the order of the Administrator established standards of identity for oleomargarine. Petitioners were in the butter business. Petitioners claimed that the standardization of the use of optional ingredients in oleomargarine impaired petitioners' competitive position, and thus adversely affected them. The Administrator argued that petitioners had no standing to review the order on the ground that those engaged in the butter industry were not directly or adversely affected. The Circuit Court of Appeals for the 8th Circuit held, nevertheless, that petitioners were parties "adversely affected" and that the Court therefore had jurisdiction to review the order.

In the *U. S. Cane Sugar Refiners'* case, petitioners were cane sugar producers who objected to an order which permitted fruit canners to use dextrose and corn syrup as optional ingredients without having so to state on the labels. Petitioners, as in the *Land O'Lakes* case, argued that their position as cane sugar producers was jeopardized and that their product was put in keener competition with dextrose and corn syrup because of the order. The Circuit Court of Appeals for the Second Circuit held (as in this case) that the effect of the order was too remote and indirect to give petitioner standing to review the order.

On the other hand, the Circuit Court of Appeals for the Second Circuit in

Associated Industries v. *Ickes*, 134 Fed. (2d) 694

held that a consumer whose sole economic injury lay in the effect of lessened competition among producers of soft coal had a sufficiently direct and substantial interest to give him the status of a person "adversely affected" and therefore standing to appeal.

This Court has reached the same result under the Federal Communications Act in

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U. S. 470

where it was held that an existing licensee claiming economic injury as a result of the increased competition from the granting of another license had standing as a person "adversely affected".

On the construction of the order adopted by the Court below, the labeling provisions do not prohibit the use of the word "lecithin" on labels, but do require the use of the term "emulsifier". Apart from the question of validity of this requirement under the language of the Act, it is obvious that few, if any, users of lecithin will go beyond the minimum requirements of the order in their labeling provisions. Thus, even though the order, in the eyes of the Court below, does not touch the manner in which petitioner's business shall be conducted (Tr., p. 208), it does adversely affect petitioner in the general use of the name of its product. Petitioner's good will, built up at great expense and over a substantial period of time, is thus directly jeopardized. To hold that such an order does not directly or adversely affect petitioner is unrealistic. Certainly, within the meaning of the *Staley* case, the *Land O'Lakes* case, the *Associated Industries* v. *Ickes* and *Federal Communications Commission* v. *Sanders* cases, *supra*, petitioner is adversely affected by the order and has standing to review it.

It may be noted in passing that the decision of this Court in

Siegel Co. v. *Federal Trade Commission,* 90 L. Ed. 697,

has relevance to the case at bar. In that case, this Court had occasion to say that in the field of administrative action, the punishment should fit the crime. Here we have another instance of an administrative order which cuts deep into petitioner's business through its effect upon the use of the name of its product. In the *Siegel* case this Court took note of the value of a name to a business man. Petitioner's right to the general and unrestricted use of the name of its product by its customers is just as surely violated by the order here involved as was the right of the petitioner in the *Siegel* case. There is no more reason shown in the record for this action of the Administrator than was found in the *Siegel* case. Yet the Court below has not only said that petitioner is not damaged but has made this the basis for ousting itself of jurisdiction.

Both on the ground of divergence of rulings by the several Circuit Courts of Appeal and on the ground of the public importance of the principle involved, this Court should grant the writ of certiorari. This conclusion is reinforced by considerations of substantial justice to petitioner in the light of the holding of this Court in the *Siegel* case.

POINT III

As a matter of law, the Administrator exceeded his authority in those portions of the order complained of by petitioner.

Petitioner does not propose to argue the merits of the case in its petition for a writ of certiorari or in its supporting brief. However, it is pertinent to indicate that there is a substantial basis for petitioner's application to review the order on its merits.

The Act in Section 401 (21 U. S. C. Sec. 341) authorizes the Administrator to promulgate regulations "fixing and establishing for any food, under its common or usual name as far as practicable, a reasonable definition and standard of identity * * *" The Act then provides that the Administrator shall designate the optional ingredients which shall be "named" on the label.

In Section 403 (21 U. S. C. Sec. 343), the Act prohibits as "misbranding" the labeling of a food product by any name other than that prescribed in the definition and standard "* * * and, insofar as may be required by such regulations, the common names of optional ingredients * * *".

The record is quite clear in this case that lecithin is the common and usual name of petitioner's product. The Government did not contend otherwise below.

The word "emulsifier" is plainly not a name but is a word descriptive of function. There was some difference of opinion disclosed in the record as to whether lecithin does or does not have emulsifying qualities; but the evidence was overwhelming that in its use in chocolate products, lecithin does not act as an emulsifier. Therefore, the word "emulsifier" not only fails to qualify as the common and usual name of petitioner's product, but is not even correct as a description of function.

Under these circumstances, it is plain that respondent exceeded his powers and authority under the Act in prescribing the use of the word "emulsifier" to designate the presence of lecithin as an optional ingredient. It is significant that respondent, in Sections 14.6 (a)(3) and 14.7 (a)(3) of his order, refers to petitioner's product by the name "lecithin" (Tr., pp. 151F and 151G). It should also be noted that respondent himself, in the proposed order, set forth in the notice of public hearings, provided for labeling by use of the word "lecithin" (Tr., pp. 32, 33, 34, 35, 36 and 37). Why respondent chose to cover the presence of lecithin in chocolate products by use of the word "emulsifier" does not appear on the face of the record. Regardless of motive, however, it is submitted that the action of respondent was invalid under the Act.

Much more might be said with respect to the evidence and findings to demonstrate that the action of respondent lacks the support of substantial evidence and is arbitrary and unreasonable. That, however, would only expand this brief to unreasonable lengths. It is sufficient to rest upon the illegality of the administrative action and the error of the Court below in refusing jurisdiction to review that order.

A writ of certiorari should be granted herein.

Dated, New York, N. Y., September 9th, 1946.

Respectfully submitted,

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DONALD MARKS,
MAX BENJAMIN,
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APPENDIX

Pertinent Excerpts From Statutes and Regulations Involved

SECTION 701 (f) (4) of the Federal Food, Drug and Cosmetic Act (June 25, 1938, c. 675)—21 U. S. C. Sec. 371 (f) (4):

"(f) *Review of Order*

• • •

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended."

SECTION 240 of the Judicial Code (28 U. S. C., Sec. 347):

"*Certiorari to circuit courts of appeals and United States Court of Appeals for District of Columbia; appeal to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.*

(a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

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Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

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No. 490

AMERICAN LECITHIN COMPANY, INC.,
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PAUL V. McNUTT, as Federal Security Administrator of the United States,
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PETITIONER'S REPLY BRIEF

The brief for the Administrator in opposition to the petition for a writ of certiorari requires reply to the following points:

I.

Certain assumptions of fact are erroneous.

In his statement of facts, the Administrator summarizes certain findings upon the premise that the facts so found are correct (Brief, pp. 4, 5). One of these findings, No. 53, is used as the basis of a statement that the specific names of emulsifiers used in chocolate products are not familiar to most consumers "but are generally referred to by their collective name 'emulsifier' "; and that, therefore, the label statement "Emulsifier Added" or "With Added Emulsifier" is an informative and appropriate statement of the presence of such ingredients.

Finding No. 53 is not supported by any evidence whatsoever in the Record. This is not an appropriate place to analyze the evidence with respect to the findings, but since the Administrator has made the statement mentioned above, it is necessary to point out that the statement is wholly incorrect and the finding from which it is taken stands without a shred of evidence in the Record to support it. There is not one word of testimony that "these substances are generally referred to by their collective common name 'emulsifiers' ". Neither is there any evidence to justify the conclusion of fact that the label statements above referred to are informative or appropriate, with respect to the presence of the optional ingredients in question.

The statement that the specific names of the emulsifiers used are not familiar to most consumers is predicated upon testimony by two students who made an ex parte and inconclusive survey on the streets in Washington in behalf of one of the intervening parties. An examination of the Record discloses that the survey was limited in scope, the questions were artificial in their significance and no question was asked as to the passer-by's knowledge of the word "emulsifier". Thus, while there is some evidence in the Record that the man on the street was not familiar with the meaning of the name "lecithin", there is no evidence whatsoever that lecithin is ever known by any other name, or that lecithin and any other products are collectively known as "emulsifiers".

That lecithin is the common and usual name of petitioner's material is attested by the Administrator's use of the word in the originally proposed order (Tr. pp. 32-37), and in Sections 14.6(a)(3) and 14.7(a)(3) of the adopted order.

The Administrator states as a fact that lecithin is suitable for use as an emulsifying ingredient in chocolate, basing this statement on Finding No. 50 (Brief, p. 5). The Adminis-

trator repeats this statement as to the use of lecithin on page 8, referring to pages 207 and 208 of the Record.

Here again, while this is no place to argue such factual questions, it should be pointed out that there is no evidence whatsoever in the Record to justify the finding that lecithin acts as an emulsifying ingredient in chocolate products. On the contrary, the Record shows clearly that there cannot be an emulsifying action in any material which does not contain two immiscible liquids, because an emulsifier is an agent which makes immiscible liquids homogenous. In cacao products, the fats constitute the only liquid (except for occasional extraneous moisture) and the function of the lecithin is to reduce viscosity and not to cause emulsification (Tr. pp. 100, 108, 115, 120, 121, 129, 131, 134). There is nothing in the Record to the contrary, and while lecithin is an emulsifier in other applications, it is wholly inappropriate and misleading to refer to it as an emulsifier in connection with its use in chocolate products.

II.

The argument as to petitioner's status rests upon untenable premises.

The Administrator states that "Petitioner is not a member of, nor does it represent, the cacao products industry" (Brief, p. 7). The fact that the Court below made the same observation in its opinion (Record, pp. 207-209) calls for comment on a point that otherwise would be wholly immaterial and irrelevant. The statute does not limit the right to review to those who are members of the industry directly affected by the order of the Administrator; nor do the decisions so construe the statute as to make this the test of "party aggrieved", or "adversely affected".

Furthermore, it should be noted that the term "member" of an industry is loose and undefined. The supplier of an

essential ingriedient may claim membership in the industry with the same force as a processor of the product itself. In any event, the manufacturer, processor or handler of a product which is directly affected by the Administrator's order is within the scope of Section 701 (f)(1), whether he may be said to be a member of the industry or not.

The Administrator assumes to state petitioner's "real complaint" (Brief, p. 8) and the "gist of petitioner's challenge of the order" (Brief, p. 11, note 2) in such a way as to minimize the effect of the order and the issues presented upon this application for a writ of certiorari.

The Administrator argues that the only effect of the order on petitioner is to expose it to greater competition, and conveys the impression that petitioner seeks to preserve some competitive advantage.

This is not so.

Petitioner's complaint is that lecithin is the common and usual name of its product; that the statute requires the Administrator to designate an optional ingredient by its common and usual name for labelling purposes; and that the Administrator has here exceeded his statutory authority.

The result of this abuse of power by the Administrator is to deprive petitioner of the value and good will inherent in the promotion and sale of its product as lecithin. The value of such an element to a business man has been repeatedly recognized by this Court. Any administrative action which places that value in jeopardy constitutes a substantial grievance. Thus petitioner complains that the order fails to require the use of the word lecithin, not because of any competitive disadvantage resulting therefrom, but because the effect is to deprive petitioner of a valuable right in the continued use of the common and usual name of its product, contrary to the mandate of the statute.

As a matter of fact, as is pointed out in petitioner's main brief, the construction of the order referred to by the Administrator is in itself unwarranted on the face of the Record. But even assuming the propriety of such construction,

the effect of the order upon petitioner is not simply to increase competition, but to deprive petitioner of the benefits of years of promotion of its product under its name lecithin.

III.

The analysis of the cases fails to note established lines of decision.

The Administrator argues that the cases clearly demonstrate that petitioner is not a party aggrieved under the statute (Brief, pp. 9 to 15). Without detailed analysis, it should be observed that a distinction must be taken between such cases as *Tennessee Power Co., Alabama Power Co., Sprunt & Son,* and *Edward Hines, Trustees* on the one hand, and *Commission* v. *Sanders Brothers Radio Station, Associated Industries* v. *Ickes* and *National Broadcasting Co.* v. *Federal Communications Commission* on the other hand. In the absence of a statutory provision for review of administrative orders by a party aggrieved, it has been said that a complainant must show the invasion of a substantial interest to justify his intervention to vindicate the public interest. However, where a statute such as the Food, Drug and Cosmetics Act contains a "person aggrieved" review provision, the same criteria are not applicable. This distinction was clearly pointed out in *Associated Industries* v. *Ickes,* C. C. A. (2nd) 134 Fed. (2nd) 694 at page 702, et seq. as follows:

> "In those cases, *Federal* v. *Sanders Radio Station,* 209 U. S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869, 1037 and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 62 S. Ct. 875, 86 L. Ed. 1229, it has been held that a 'person aggrieved', seeking review under such a statutory provision need not show that he has such a 'standing' as it is ordinarily required either in injunction suits

to restrain actions by officials * * * or in declaratory judgment suits to determine the validity of such action.

* * *

With the majority opinion, illuminated by that dissent, we believe that the usual 'standing to sue' cases can be reconciled with the Sanders and Scripps-Howard cases, as follows:

* * * Congress * * * can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, * * * and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

* * *

The court, in the Sanders and Scripps-Howard cases, as we understand them, construed the 'person aggrieved' review provision as a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit * * * to prevent unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the 'person aggrieved' statute gives the needed authority to do so to one who comes within that description. True, in the Sanders and Scripps-Howard cases, the review provisions of the statute referred not only, as here, to a 'person aggrieved' but also to a 'person adversely affected' by the administrative order; we think, however, that the omission of the latter clause in Sec. 6 (b) of the Act before us makes no significant difference. * * *

> Of course, not every person is a 'person aggrieved'. But the Supreme Court has explicitly told us that one threatened with financial loss through increased competition from a Commission's order is 'aggrieved' and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition. It would seem clear, then, that a consumer threatened with financial loss by a Commission's order, which fixes prices and prevents competition among those from whom the consumer purchases, is also a 'person aggrieved'."
>
> * * *

The Administrator places great emphasis upon the decision of the Circuit Court of Appeals for the Second Circuit in *U. S. Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 Fed. (2nd) 116 (Brief, pp. 12-15). An excerpt from the opinion in that case is quoted to support the proposition that the order in this case does not have such direct adverse effect upon petitioner as to establish its standing to sue.

The Administrator argues on the basis of the *Cane Sugar* decision that exposure to increased competition is not a sufficient direct and adverse effect under the statute. It should be noted, however, that this line of distinction is not applicable where the adverse effect consists of the deprivation of good will and advertising value connected with the common and usual name of a product. In any event, even if the sole question here were the degree of adverse effect of the order upon petitioner, that effect is sufficiently direct and substantial to qualify petitioner as a party aggrieved. In this connection, the following statement by the Circuit Court of Appeals in the *Cane Sugar* case (omitted in the Administrator's Brief) should be noted:

> "As we said in the Associated Industries case, a consumer threatened with the prospect of having to

> pay higher prices for coal because of an order which fixes prices and prevents competition among those from whom the consumer purchases is a person 'aggrieved'. The effect in that instance was direct as well as certainly adverse. So, too, increased competition may be enough, though the policy behind the statute is to maintain competitive practices that are in the public interest, to show that a person has been 'adversely affected' by an administrative order. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869, 1037.

The Administrator seeks to bolster the dismissal of the petition below by painting an ominous picture of the chaos that would result from permitting persons "as remotely affected as petitioner" to challenge the Administrator's order (Brief, p. 16). The Administrator also points to a variety of trade names of lecithin and other ingredients as examples of the ramifications of petitioner's complaint (Brief, p. 17). It may be observed that there is no justification for either cry of "wolf".

As to the first point the Record does not show any "scramble" to bring complaints against the Administrator before the Courts. There has been no noticeable smothering of the Administrator "with a welter of conflicting claims" (Brief, p. 18). If petitioner's case is just and its complaint against the Administrator is legally sound, statutory limitations upon the Administrator's authority should be enforced regardless of the possibility of other complaints. The remedy, if the Administrator's forebodings prove accurate, is with Congress.

As to the second point the suggestion that manufacturers of lecithin will seek permission to have their trade names approved for label purposes is specious. Petitioner seeks only approval of the name "lecithin" which is the common and usual name of the material, and not a fanciful trade name. The existence of a variety of trade names has no bearing

upon this case. Petitioner seeks only its rights under the statute and does not argue for a commercial advantage, as the Administrator suggests.

CONCLUSION

In view of the error of the Circuit Court of Appeals in dismissing the petition, this application for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 490

AMERICAN LECITHIN COMPANY, INC., PETITIONER

v.

PAUL V. McNUTT, AS FEDERAL SECURITY ADMINISTRATOR OF THE UNITED STATES [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 207–209) is reported at 155 F. 2d 784.

[1] Paul V. McNutt was the Federal Security Administrator at the time this action was instituted under Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act (*infra*, p. 3). No question of abatement of the action by reason of the fact that he no longer holds that office is involved, however, in view of the provision of Section 701 (f) (5) of the Act (21 U. S. C. 371 (f) (5)) that "Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office."

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1946 (R. 210). The petition for a writ of certiorari was filed September 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was "adversely affected" by the Administrator's order and presented in its petition for review of the order "a case of actual controversy" within the meaning of Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act, so as to give the court below jurisdiction to entertain the petition.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 401 [21 U. S. C. 341]. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * *. In prescribing a defini-

tion and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *

SEC. 701 (e) [21 U. S. C. 371 (e)]. The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401 * * *. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

SEC. 701 (f) (1) [21 U. S. C. 371 (f) (1)]. In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United

States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order.

SEC. 701 (f) (3) [21 U. S. C. 371 (f) (3)]. The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT

On December 4, 1944, following hearings held pursuant to Section 701(e) of the Federal Food, Drug, and Cosmetic Act (R. 38–147, 155–191), public notice of which was given (R. 30–37), and in which petitioner participated (see R. 41, 43, 53, 57, 62, 65–101, etc.), the Administrator issued an order, which was published in the Federal Register on December 6, 1944 (9 Fed. Reg. 14329), establishing definitions and standards of identity for cacao products, pursuant to Section 401 of the Act (R. 151–151H). The order permits the use of lecithin as an optional ingredient in chocolate and chocolate coating (Regulations, §§ 14.6 (a) (3) and 14.7 (e) (3)), but requires that, when lecithin is so used, the label bear the statement "Emulsifier Added" or "With Added Emulsifier" (Regulations, §§ 14.6 (e) (2) and 14.7 (c) (2)) (R. 151 F, 151 G). The Administrator's findings of fact, on which the foregoing regulations were based, may be summarized as follows: Uniformity of viscosity

is important in chocolate coating in order to insure the uniformity of thickness of covering demanded by confectioners (Finding No. 49); the viscosity of different batches of chocolate can be held within a narrow range by the use of small quantities of an emulsifying ingredient, and lecithin is suitable for use as such an ingredient (Finding No. 50); incident to its desired effect of maintaining uniform viscosity of coating, the use of an emulsifier makes it possible to obtain a given viscosity with less cacao fat than would otherwise be required, and since coatings containing emulsifiers may contain lesser quantities of cacao fat than a chocolate of similar viscosity which does not contain emulsifiers, it is in the consumer's interest to know when emulsifiers are present (Finding No. 52); and since the specific names of the emulsifiers used are not familiar to most consumers (see R. 163–183, 195–206), but are generally referred to by their collective common name "emulsifiers," the label statement "Emulsifier Added" or "With Added Emulsifier" is an informative and appropriate statement of the presence of such ingredients (Finding No. 53). See also Finding No. 58. (R. 151 C.)

Evidence was adduced at the hearings that lecithin is an emulsifier and stabilizer, used by chocolate manufacturers to adjust the viscosity of chocolate products and permit an even spread of chocolate coating to candy, ice cream, etc. (R. 49, 50, 66, 67, 73, 76, 89, 90, 107, 163, 183, 184).

On February 8, 1945, petitioner filed in the Circuit Court of Appeals for the Second Circuit a petition for judicial review of the Administrator's order, praying that it be set aside in so far as it requires the use of the label statement "Emulsifier Added" or "With Added Emulsifier" for the optional ingredient lecithin, and in so far as it prohibits the use of the specific word "lecithin" as the label identification of petitioner's product when used as an optional ingredient in cacao products (see R. 207, 208). The circuit court of appeals held that petitioner was not "adversely affected" by the order and did not present "a case of actual controversy" as to the validity of the order, as required by Section 701 (f) (1) of the Act, *supra,* p. 3, and accordingly dismissed the petition for lack of jurisdiction. The court observed in its opinion that petitioner was not a member of, and did not represent, the cacao products industry; that the order did not touch the manner in which petitioner's business should be conducted and petitioner could still sell its product under the name "lecithin," the label requirements of the order being directed only to its customers; that even as to petitioner's customers, the order did not, as petitioner's prayer for relief erroneously assumed, prohibit them from using the word "lecithin" on their labels, provided they observed the prescribed label declaration—that is to say, petitioner's customers might, if they wished, and as respondent expressly conceded, use

a label statement reading "Emulsifier Lecithin Added" or "With Added Emulsifier Lecithin"; that inasmuch as petitioner's customers were privileged at their option to use or not use the word "lecithin" on their labels, if they did not use it it would be their election, not the terms of the order, which would deprive petitioner of any advertising or competitive advantage which might be gained from having the labels carry the word "lecithin"; and that petitioner could not be damaged by the addition of the word "emulsifier" as descriptive of lecithin, since the findings of fact made by the Administrator state that emulsifiers are commonly added to chocolate, and that lecithin and other substances are suitable for use as such emulsifying ingredients. (R. 208–209.)

ARGUMENT

The sole question before this Court is whether petitioner was "adversely affected" by the Administrator's order and presented in its petition for review "a case of actual controversy" within the meaning of Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act. We submit that the court below was clearly correct in answering this question in the negative and, accordingly, dismissing the petition for lack of jurisdiction.

Petitioner is not a member of, nor does it represent, the cacao products industry. Its sole connection with that industry is that some chocolate

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manufacturers purchase petitioner's product, lecithin, for use as an emulsifying ingredient in chocolate products (See R. 207–208). The Administrator's order does not in any manner restrict the sale of petitioner's product. It expressly permits the use of lecithin as an optional ingredient in chocolate, provided its presence is indicated by a statement on the label that an "emulsifier" has been added. If petitioner is affected by the order, it is because chocolate manufacturers who use lecithin in their products need not, under the order, specify the type of emulsifier used. They may, but they need not, whence arises the nub of petitioner's complaint: "it is obvious that few, if any, users of lecithin will go beyond the minimum requirements of the order in their labeling provisions. Thus, * * * the order * * * does adversely affect petitioner in the general use of the name of its product. Petitioner's good will, built up at great expense and over a substantial period of time, is thus directly jeopardized" (Pet. 14). Petitioner's real complaint, therefore, is seen to lie in the fact that the order, by failing to require the name of the specific type of emulsifier used to be declared on the label, may subject petitioner to increased competition with other producers of emulsifying agents used in chocolate products.

This Court has held, however, that injury sustained merely through the operation of competition does not confer standing to challenge gov-

ernmental action favorable to a competitor. *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 139–140; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–483; *Sprunt & Son* v. *United States*, 281 U. S. 249, 254–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143. *Commission* v. *Sanders Radio Station*, 309 U. S. 470, cited by petitioner (Pet. 14), is distinguishable on grounds succinctly stated by this Court (pp. 476–477). *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. C. A. 2), order vacated, 320 U. S. 707, also cited by petitioner (Pet. 14), is likewise clearly distinguishable. It was there held that *consumers*, threatened with the prospect of forthwith having to pay higher prices for coal as the result of the order under review, were "persons aggrieved" by the order so as to have standing to sue. The court was careful to point out, however, that even "financial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy" (p. 701), citing the *Alabama Power Co.* and *Tennessee Power Co.* cases, *supra*.

Petitioner urges, however (Pet. 12–13), that the decision below is in conflict with *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. 2d 258 (C. C. A. 7), and *Land O'Lakes Creameries* v. *McNutt*, 132 F. 2d 653 (C. C. A. 8). In the *Staley Mfg. Co.* case, an order establishing a

definition and standard of identity for sweetened condensed milk permitted the use of refined sugar or a combination of refined sugar and refined corn sugar as sweetening ingredients, but did not permit the use of corn syrup. Since the effect of the order was to prevent makers of sweetened condensed milk from using corn syrup as a sweetener, and since corn syrup producers were thus deprived of the opportunity to compete in that field with other producers of sweetening ingredients, it was held that a corn syrup manufacturer had standing to challenge the order. In the *Land O'Lakes Creameries* case, an order establishing a definition and standard of identity for oleomargarine permitted the use of sodium benzoate, Vitamin A, and diacetyl as optional ingredients. Butter producers petitioned for review of the order, alleging that its effect was adverse to their interests as competitors of the oleomargarine industry in that the right to include the named optional ingredients permitted oleomargarine more nearly to simulate butter, thereby tending to deceive the consumer. The court, "with some misgivings" (p. 658), resolved in the petitioners' favor its doubts with respect to their standing to challenge the order.

But petitioner in the instant proceeding goes much further than the petitioners in the two cases just discussed. Although the regulations do not prevent or hamper petitioner's sales in any re-

spect, as in the *Staley Mfg. Co.* case, and do not establish a definition and standard of identity for any product which is in competition with its product, as in the *Land O'Lakes Creameries* case, petitioner claims that it is adversely affected thereby and that a case of actual controversy exists. We submit, however, that petitioner is not adversely affected within the meaning of the statute. Petitioner is free to continue to sell its product to its customers as lecithin, and its customers are free to use it as an optional ingredient in their products. Nothing in the regulations prevents its customers from stating on their labels, if they so desire, that they have used lecithin.[2]

[2] Petitioner complains that the court below "ousted itself of jurisdiction upon a construction of the order dehors the record * * * without public announcement and by mere statement in the Government's brief and argument before the Court" (Pet. 5; see also Pet. 4, 9, 10–11). Petitioner has reference to a statement in the Administrator's brief below that "Nothing in the regulations prevents its [petitioner's] customers from stating on their labels, if they so desire, that they have used lecithin." While the court below alluded to this as a "reasonable construction by the Administrator of his own order" (R. 208), we do not think the statement in the Administrator's brief is a "construction" in the sense of a clarification of something doubtful or ambiguous, but simply a statement of what was already plain without construction. In any event, we do not perceive how the asserted "construction" could have been calculated to undermine petitioner's standing to challenge the order as a person "adversely affected" by it, as petitioner suggests (see Pet. 5), since the gist of petitioner's challenge of the order is not that its customers are not *permitted* to specify that lecithin is the emulsifying agent used in their products, but that they are not *required* to do so.

Petitioner's customers may continue to purchase its product as lecithin just as they did prior to the issuance of the regulations. Manufacturers of cacao products may also choose to purchase and use products which are in competition with petitioner's product, but this they could also do before the issuance of the regulations. So far as the record shows, the sole effect of the regulations on petitioner is that, conceivably, manufacturers who, prior to the issuance of the regulations, felt constrained to purchase lecithin exclusively because otherwise they would be required to keep on hand supplies of different labels describing each optional emulsifying agent (see R. 60–61, 122, 185–186), now no longer need feel such constraint. It seems clear, however, that this effect of the regulations is not "of sufficient immediacy and reality" to make out a "substantial controversy" (*Md. Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273) or "something more than nominal or highly speculative" (*National Broadcasting Co.* v. *Federal Communications Com.,* 132 F. 2d 545, 548 (App. D. C.), affirmed, 319 U. S. 239).

A case more nearly in point than either the *Staley Mfg. Co.* or *Land O'Lakes Creameries* case is *United States Cane Sugar Refiners' Ass'n* v. *McNutt,* 138 F. 2d 116, also decided by the Circuit Court of Appeals for the Second Circuit. That case involved a petition by associations of sugar growers to review an order

fixing definitions and standards of identity for various canned fruits. The petitioners claimed they were adversely affected by reason of the fact that the regulations permitted the fruit canning industry to use as optional ingredients dextrose and corn syrup, which were in competition with the petitioners' product, without declaring that fact on the labels. It was held that the petitioners were not adversely affected within the meaning of Section 701 (f) (1) of the Act and the petition was dismissed for lack of jurisdiction. After reviewing the *Staley Mfg. Co.* and *Land O'Lakes Creameries* decisions, the court stated the reasons which it felt required dismissal of the petition in the following cogent language, which, we think, is equally applicable in the instant case (pp. 120–121):

> * * * It is inevitable that such regulations as these will affect in one way or another a large number of persons. In a sense they "affect" the public at large for whose benefit they are promulgated. It is to be expected that this effect may be thought to be "adverse" by a lesser, but still large number of persons not engaged in making or selling the standardized product. It is, however, inconceivable that Congress intended to permit all persons who could show a remote and uncertain likelihood that the regulations would injuriously affect the market for their produce to file petitions to review merely because they de-

cided that they had been, or might possibly be, put in danger of that. In order to prevent such obstruction to the orderly administration of the statute by virtually unlimited petitions to review, it is necessary that the class of petitioners who have "standing to sue" be confined to those who can show some direct adverse effect traceable with reasonable certainty to the regulations promulgated.

* * * The paramount need for the orderly and the reasonably expeditious administration of the statute by the official charged with the duty of making it effective in the public interest creates at least the need of limitations upon the construction of the term "adversely affected" to do away with delays that otherwise could be brought about by persons upon whom the adverse effect of the regulations would at most be so negligible that it should be disregarded to effectuate the public interest the statute was designed to promote.

* * * What the petitioners are really claiming is that the regulations will do away with the remote, speculative sales resistance of the public to the marketing of the canned fruits sweetened in some part with dextrose or corn sirup which might be present if the labels on the cans disclosed, by naming them, that the permitted amounts of one or the other or both of the optional sweeteners had been added to the required sugar. If such a tenuous likeli-

> hood of injury were enough to cause the petitioners to be "adversely affected," the opportunity for maintaining petitions to review such regulations as these would be so unlimited as to be a serious threat to the practical administration of the statute. * * *

In the instant case, the court below, after adverting to its holding that any adverse effect of the order involved in the *Cane Sugar* case was "too remote and indirect to give the petitioner standing to review the order," remarked that "In the case at bar the damage is even more speculative than in the *Cane Sugar* case, for it will turn on whether or not the petitioner's customers elect to mention lecithin as the emulsifier they have added" (R. 209).

Assuming that the *Staley Mfg. Co.* and *Land O'Lakes Creameries* cases were correctly decided, it is submitted that those cases should mark the outermost limits that courts should go in holding that a person or company is adversely affected by an order establishing definitions and standards of identity under the Federal Food, Drug, and Cosmetic Act. Indeed, the *Land O'Lakes Creameries* opinion recognizes that that case was a borderline one. The adverse effects of the orders on the petitioners in the *Cane Sugar* case and the instant case were, as we have shown, far more speculative and insubstantial than were the orders involved in those cases, and the court below was,

we submit, clearly right in dismissing the petitions in both cases for lack of jurisdiction.

If petitioner's theory as to who has standing to challenge an order establishing a definition and standard of identity under the Federal Food, Drug, and Cosmetic Act be correct, then any one who sells goods to members of the industry directly affected by the order may challenge it if his product, under the order, must be designated by a term which he dislikes or which generically includes his competitor's products. The consequences to which such a theory would lead show the basic unsoundness of the theory. The persons "affected" by an order of the Administrator in the remote sense of not liking the name by which the ingredient purveyed to the industry concerned must be designated are legion. For all persons as remotely affected as petitioner to be recognized as authorized to challenge the Administrator's order would invite a scramble to bring before the courts every conceivable situation where not only members of the industry affected, but every supplier of every ingredient sold to a member of the industry, preferred that its particular trade name be used to the exclusion of some more general term of description.

The number of potential ingredients which may be purveyed to members of an industry for whose product a definition and standard of identity may be prescribed is manifold, and the competitive

situation extremely complicated. In the instant case, for example, petitioner's product is only one of many similar products which are or may be used by members of the cacao products industry as optional ingredients. The Emulsol Corporation manufactures "Chovis" (R. 183); the W. A. Cleary Corporation manufactures lecithin (R. 189–190); the Chemical Novelties Corporation manufactures a number of lecithin products under the trade mark "Vejin" (R. 123); Refining, Inc. supplies lecithin for chocolate and other edible products (R. 144, 191); and Ross & Rowe, Inc. distributes "Yelkin," a standardized lecithin, for use in chocolate (R. 192). Each of these manufacturers is presumably as much interested in its product, its name, the advertising value of having its name designated on labels, and its good will, as petitioner. Petitioner itself sells lecithin under various names, such as "Lexin" and "Margo" (R. 192–194).

Nor do the complications involving these various trade names end the ramifications which would result from a holding that a producer of an ingredient sold to the industry concerned is "adversely affected" because he is dissatisfied with the manner in which his product must be described by members of the affected industry. "Lecithin" itself is a generic term covering a number of products (R. 145, 146, 150, 162–163). The W. A. Cleary Corporation and the Chemical

Novelties Corporation make "soy lecithin" or "soy bean lecithin," obtained from soy beans (R. 123–124, 189–190, 191). Presumably, they might feel themselves aggrieved if the regulations were to prescribe that their products be described on labels used by the cacao products industry merely as "lecithin" rather than, for example, "soy lecithin." The Chemical Novelties Corporation also manufactures "cocoa butter lecithin" (R. 191) (as does petitioner (R. 133–134)), which has a cocoa butter rather than a soy bean oil carrier (R. 141). The manufacturers of lecithin with a cocoa butter carrier might claim that the nature of the carrier in which the lecithin is contained should be described on the labels of manufacturers using the product.

It would not promote the purposes of the Act to smother the Administrator and the courts with a welter of conflicting claims having to do not with the promotion of consumer interest but with the maintenance or securing of some assumed commercial advantages by the many concerns supplying ingredients to an industry whose product has been defined and standardized. If these claims may be presented by everyone failing to secure such an advantage, the effectiveness of the Act may well be paralyzed, and courts confronted with what are primarily legislative considerations, to an extent Congress never could have contemplated. That this could have been the intent

of Congress with respect to a remedial statute such as the Federal Food, Drug, and Cosmetic Act, designed to protect the public health and pocketbook, is not to be presumed. Cf. *United States* v. *Dotterweich*, 320 U. S. 277, 280.

CONCLUSION

The decision below is clearly correct, and no real conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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